Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

ELIZABETH WILSON,

Petitioner,

v.

MANPOWER INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Age Discrimination in Employment Act (ADEA), as construed by the Court's decision in *Reeves*, if a terminated employee establishes a *prima facie* case of discrimination, the employer may then produce evidence of a non-discriminatory reason for termination. The terminated employee must then come forward with evidence showing that the claimed non-discriminatory grounds for termination are, in fact, false, or with other evidence establishing discrimination. As previously recognized by Justices O'Connor and Ginsberg in *Reeves*, there is a need "in the appropriate case" for the Court to elaborate more fully the nature and extent of the evidence that a terminated employee must present, after having established a *prima facie* case of discrimination, to attack evidence of non-discrimination produced by an employer, in order to survive a motion for summary judgment.

The questions presented are, what is the nature and extent of the evidence that a terminated employee must produce to overcome an employer's "production" of evidence of non-discriminatory termination in order to avoid summary adjudication. Additionally, did the district court fail to apply this Court's holding in *Reeves* by improperly weighing the evidence, making determinations of credibility, and failing to draw all inferences in favor of the Petitioner in passing upon Respondent's motion for summary judgment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Forrester, D.J.) granting Respondent Manpower International, Inc.'s summary judgment motion (Appendix ("Pet. App.") 3a-32a) is unpublished. The court of appeals' opinion *per curium* is published at 49 Fed. Appx. 288, ___, F.3d ____ (Table). (Pet. App. 1a-2a).

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on September 19, 2002, affirming, *per curium*, the judgment of the district court. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, and 29 U.S.C. § 623, relevant to this petition are reprinted in the Appendix at 20a-21a.

STATEMENT OF THE CASE

At the time of the termination of her employment by Respondent, Petitioner was 59-years old, and Respondent's

Atlanta area manager.[1] Petitioner established the elements of a *prima facie* case of age discrimination, *i.e.*, that she was in the "protected class" of persons, was qualified to be an area manager, was terminated, and was replaced by a substantially younger person. Respondent then produced evidence that Petitioner was terminated for "employee abuse."[2] Petitioner then produced evidence that: Respondent knew that claims of "employee abuse" were likely untrue; that there was no record of the purported "investigation" upon which Respondent claimed to have relied in terminating Petitioner; that Respondent's hiring practices evidenced a statistical bias against older employees; and that despite the alleged "employee abuse" Respondent offered another management position to Petitioner requiring even greater employee contact. Petitioner also produced written direct evidence contradicting Respondent's claim that any actions of Petitioner resulted in "high turnover."

In weighing the evidence the district court held that Petitioner's evidence failed to create a question of fact regarding whether Respondent's stated grounds for termination were pretextual, and discounted the relevance of Petitioner's other evidence, including statistical evidence showing Respondent's age bias in its promotion practices, and granted summary judgment for Respondent. The court of appeals affirmed *per curium*. The holdings below merit this court's immediate review because: (1) as previously

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[1]Responsible for 3 district managers operating 10 offices, and approximately 60 employees.

[2]Respondent's claim of "high turnover" as an additional grounds for termination, which grounds were thereafter credited by the district court, was never claimed as such by Respondent in its discovery responses. Respondent expressly disclosed that the sole ground for Petitioner's termination was "employee abuse."

recognized by Justice Ginsberg in *Reeves v. Sanderson Plumbing Products, Inc.*, (530 U.S. at 154-155, 120 S.Ct. at 2112 (2000)), it may be "incumbent on the Court in an appropriate case," to more precisely prescribe the extent and nature of the evidence required to be produced by a plaintiff/employee to rebut the evidence produced by an employer regarding the claimed non-discriminatory grounds for termination, in order to survive a motion for summary judgment.[3] This is that "appropriate case"; and (2) The district court failed to apply this court's holding in *Reeves, supra,* in that the district court improperly weighed the evidence, made credibility determinations, failed to draw all reasonable inferences in favor of the Petitioner, failed to disregard Respondent's evidence that a jury was not required to believe, and improperly rejected Petitioner's statistical evidence.

(1) Petitioner was born on November 18, 1939. She began employment with Respondent in March, 1993 as a branch manager, became a district manager in 1994, and in 1995 became the area manager for Atlanta, which position she occupied at the time of her termination in January 1999, at the age of 59. She received consistent salary increases in every position she occupied, and her performance appraisals, as well as testimony from her superiors, were uniformly exemplary. Before Petitioner became the Atlanta area manager the performance of that area, including the performance of its personnel, was "dismal at best."[4] Petitioner was expressly instructed by her superiors to address the issue of chronic

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[3]This same concern was voiced by Justice O'Connor in the Court's unanimous opinion at U.S. 148-149, S.Ct. 2109.

[4]Testimony of Petitioner's direct supervisor, Regional Vice President (RVP) Carl Grizzle.

under-performance in the Atlanta area.[5] Personnel turnover had always been very high in Atlanta because Respondent under-compensated its employees, and because of the general nature of the employment marketplace.

As expressly directed, Petitioner implemented Respondent's system in Atlanta, worked tirelessly, accomplished everything that was asked of her, and her performance was equal to or greater than any of the other area managers in Mr. Grizzle's region. Petitioner immediately turned around the Atlanta area producing ". . . exceptional profit production improvement in 1995 over the prior year . . .", which performance " . . . dramatically exceeded corporate performance." The performance of the Atlanta marketplace under Petitioner continued to be exceptional during her tenure which, according to Mr. Grizzle, reflected Petitioner's leadership, business development, staff supervision, and management skills.[6]

As a result of implementing Respondent's programs and directives, some employee "complaints" were received in 1996 and 1997. Mr. Grizzle conducted a full investigation of those "complaints" and found them to be meritless. He communicated his findings directly to his superior, Mr. D. Krueger. Mr. Grizzle also informed Mr. Krueger that, in the two and one-half (2½) years he had worked directly with Petitioner he had never seen any of the characteristics

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[5]Petitioner was instructed, in writing, by RVP Grizzle to "become more aggressive in dealing with your managers . . . not to accept excuses for managers and staff with regard to performance . . . be firm, decisive, make the tough decisions . . . and don't be afraid to hurt somebody's feelings . . . [T]his business is one of profits, not personalities."

[6]Testimony of RVP C.Grizzle.

complained of that had been disproved by the investigation conducted by him, nor had any of Respondent's employees in the Atlanta area ever complained to him of any abusive actions of Petitioner.

In February 1998, because of her exemplary performance record, Petitioner requested consideration for the position of Southeast RVP that had been vacated by Mr. Grizzle. Wilson was then 58 years old. However, Respondent had not promoted anyone over the age of 49 to the position of RVP since at least January 1, 1996, which covered the entire tenure of Respondent's then executive vice-president, T. Hueneke.[7] When Mr. Krueger disclosed Petitioner's interest in the RVP position to Mr. Hueneke, Hueneke's only response was "to smile" according to Mr. Krueger.

In June of 1998, Respondent claimed that additional "complaints" had been received regarding Petitioner's treatment of employees. Those "complaints" were primarily attributed to a district manager under Petitioner, Ms. Priestman.[8] Contrary to Respondent's claims of "employee abuse," and consistent with the results of Respondent's prior investigation by Mr.Grizzle, Ms. Priestman's deposition testimony confirmed that Petitioner: never screamed or yelled, or had any "temper tantrums"; never threw anything; never threatened anyone, never yelled about late or insufficient reports being submitted to her; never touched anyone; and Ms.

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[7]Since January 1996, of six promotions by Respondent to RVP, not one had attained the age of 49. Of 36 people promoted to area manager in that same period, only 3 had reached the age of 50.

[8]Responsible for managing five (5) of Respondent's offices in Petitioner's Atlanta area. Ms. Priestman worked in the same offices as Petitioner.

Preistman was never told by anyone that Petitioner had touched them. Additionally, Petitioner always discussed anything with Ms. Priestman which Ms. Priestman wanted to discuss, and that no one had ever come to Ms. Priestman with a complaint about the Petitioner. On January 13, 1998, after having worked with Petitioner for approximately one (1) year, Ms. Priestman sent Petitioner a card stating: "I am very proud to be a member of your team. You are a pleasure to work with. Sincerely, Geri." Ms. Priestman also agreed to provide an employment recommendation for Petitioner after she had been terminated, and confirmed at the time of her deposition that she was not aware of any reason to terminate Petitioner even one month before Petitioner's termination.

The district court also considered the issue of claimed "high employee turnover" regarding Petitioner's termination, although Respondent had never claimed that Petitioner's termination was related to "high turnover." In any case, turnover was always high in Atlanta because of the nature of the market and Respondent's under-compensation of its employees.[9] Respondent produced no evidence whatsoever of any increase of turnover in the Atlanta area under Petitioner, or, consistent with Ms. Priestman's testimony, to "turnover" in any way related to "employee abuse" by Petitioner. Rather, of the nineteen (19) Atlanta area employees leaving Manpower in 1998, during the twelve (12) months immediately before Wilson's termination, of the sixteen (16) employees indicating a reason for leaving Respondent's employ in job exit interviews, none were related in any way to a claim of "employee abuse."

Respondent claimed that an "investigation" of Respondent was then conducted by its legal department. No

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[9]This was confirmed by the testimony of both Mr. Grizzle and Ms. Priestman.

type of written report or documentation of the purported "investigation" was ever made or exists. Respondent's employees responsible for Petitioner's termination[10] conceded that they had never seen, or known of, any type of written report or "investigation" with regard to the claimed "employee abuse" of Petitioner. Neither had they verified any of the "verbal information" they claimed to have received, despite the fact that the prior investigation conducted by Mr. Grizzle had shown prior claims of "employee abuse" to be wholly without merit.

Petitioner was then told she was being terminated as Atlanta area manager, and offered an alternative position as a district manager (demotion) in North Carolina, which position required more employee contact and supervision then did Petitioner's position as Atlanta area manager. Refusing the demotion, Respondent terminated Petitioner in January, 1999.

(2) The district court held that Petitioner established a *prima facie* case of discrimination pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[11] Petitioner having established a *prima facie* case of discrimination, the district court held that the Respondent had a burden that was "... merely one of production, not persuasion, and it involves no credibility assessment by the Court," of articulating a legitimate non-discriminatory reason

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[10]Mr. T. Hueneke (executive v.p. for North and South America and Asia), Mr. D. Wescoe (v.p. of North American Administration), and Mr. Krueger (v.p. for U.S. operations), all of whom worked in the same office area in Milwaukee.

[11]The district court recognized that this Court has not yet addressed squarely whether the McDonnell Douglas framework is applicable to cases under the ADEA, citing *Reeves*. *See* Pet. App. 7a fn5.

for the termination of the Petitioner, citing *Reeves, supra,* at 142. *See* Pet. App. at 19a. The district court found that Respondent met its burden by offering evidence that Petitioner's termination was based upon chronic employee relations problems attributable to Petitioner "as reflected by the complaints received about her as well as low morale and high turnover in her area." *See* Pet. App. at 19a. As a result, the district court held that the presumption of discrimination arising out of the Petitioner's *prima facie* showing dropped from the case, and Petitioner was required to come forward with "significantly probative evidence that the proffered reason is a pretext for discrimination," and that the Petitioner could do this by "directly persuading the Court that [Respondent] more likely was motivated by a discriminatory reason or by indirectly showing that [Respondent's] explanation is not believable." *See* Pet. App. at 19a-20a.

At this juncture in its reasoning, the district court analyzed the Court's holding in *Reeves* (Pet. App. 20a, fn9). The district court stated as follows:

> A plaintiff's *prima facie* case in conjunction with evidence sufficient to allow a reasonable fact finder to find that the defendant's asserted reason is false, **may** support a determination that the defendant unlawfully discriminated against the plaintiff. 530 U.S. at 148 (2000). [Emphasis in original.]
>
> Prior to the decision in *Reeves*, the Eleventh Circuit had held that judgment as a matter of law was unavailable to a defendant once the plaintiff had presented sufficient evidence of pretext as to each of the defendant's legitimate, articulated reasons. *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir.

> 1997). In *Chapman* en banc, the Eleventh Circuit recognized that *Reeves* modified its previous decision in *Combs* such that judgment as a matter of law and summary judgment sometimes will be available to a defendant in such a case. *Chapman*, 229 F.3d at 1025 n.11. Thus, pursuant to *Reeves* a plaintiff may not be entitled to take her case to a jury even if she presents sufficient evidence that the defendants articulated reasons are pretextual. *Id.* This conclusion flows from the caveat in *Reeves* that a sufficient showing of pretext will not **always** entitle a plaintiff to a jury verdict in her favor. 530 U.S. at 148.
>
> The Court in *Reeves* recognized that there would be instances where despite the plaintiff's evidence of pretext sufficient to reject the defendants explanation for the challenged employment action, "no rational fact finder could conclude that the action was discriminatory." *Id.* The Court posited that: [f]or instance, an employer would be entitled to [summary judgment] if the record conclusively revealed some other, non-discriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

The district court then identified ten (10) factual issues regarding which Petitioner had presented evidence relevant to the Respondent's stated grounds for termination being pretextual, and, thereafter, proceeded to weigh the evidence

and make determinations of credibility. *See* Pet. App. 20a-18a. Following this process, the district court entered summary judgment for Respondent, dismissing the claims of Petitioner. *See* Pet. App. 31a.

(3) On Respondent's appeal, the Eleventh Circuit affirmed the district court's order of summary judgment, *per curium*.

(4) This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The petition should be granted for three reasons. *First*, in ADEA actions the Court has recognized the need for elaboration regarding the nature and extent of the evidence that a terminated employee must produce to overcome an employer's mere "production" of evidence of non-discriminatory treatment, in order to avoid summary adjudication.

Second, the existing uncertainty invites confusion developing regarding the role of the district courts in weighing the evidence, making determinations of credibility, and applying the obligation to draw all inferences in favor of employees, when considering employees' evidence of discrimination, contrary to the historic standards of summary adjudication.

Third, by improperly weighing the evidence, making determinations of credibility, and failing to draw all inferences in favor of the Petitioner, the district court failed to properly apply the standards of summary judgment to the ADEA proceedings below.

I. In ADEA cases, the Court has recognized the need

for further elaboration of the evidentiary burdens of plaintiff employees when defendant employers have produced evidence of non-discriminatory treatment, in order to avoid summary adjudication.

The Court's holding in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed 2d 668 (1973), and subsequent decisions, have "established an allocation of the burden of production and an order for the presentation of proof in...discriminatory-treatment cases." *Reeves*, supra at U.S. 142, S.Ct. 2106. The first step is for the employee to establish a *prima facia* case of discrimination. *Ibid.* If a *prima facia* case is established, the burden shifts to the employer to "produce evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason." *Ibid.* However, the employer's burden is one of production, not persuasion, and it can involve no credibility assessment. *Ibid.* If the employer satisfies this burden, the presumption of discrimination arising from the *prima facia* case disappears. *Reeves* at U.S. 143, S.Ct. 2106. If the employer produces such evidence, the plaintiff employee is afforded the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Ibid.*

In further elaborating on the three-part test of *McDonnell Douglas*, and to address a conflict between the circuits in the application of the test, the Court in *Reeves* addressed the import of evidence produced by a plaintiff-employee tending to show, or infer, that the grounds for termination advanced by the employer were not credible, and therefore could be rejected by the trier of fact. As held by the Court in *Reeves*, evidence established that the employer's justification for its actions was eliminated, making it

"permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves* at U.S. 149, S.Ct. 2108, citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742 (1993).

Writing for a unanimous Court in *Reeves*, Justice O'Connor recognized that the nature and extent of the evidence required to be produced by an employee in order to avoid summary adjudication was uncertain, requiring a balancing of the burdens under the ADEA, and the standards of summary adjudication.[12] Justice O'Connor then set forth examples of the nature and extent of the evidence that an employee would be required to provide, in addition to a *prima facia* case, in order to rebut the evidence of non-discriminatory treatment produced by an employer. *Reeves* at U.S. 147-149, S.Ct. 2108-2109. However, Justice O'Connor reasoned that the Court did not have to address this issue in *Reeves*, stating that "[F]or purposes of this case, we need not-and could not-resolve all of the circumstances in which such factors would entitle an employer to judgment as a matter of law." *Reeves* at U.S. 149, S.Ct. 2109.

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[12]Analogizing the standards of a Rule 50 motion with proceedings for summary judgment under Rule 56, a court must review the record "taken as a whole." A court must draw all reasonable inferences in favor of the nonmoving party, and may not make credibility determinations or weigh the evidence. Rather, credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts, are jury functions, not those of a judge. Although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe, i.e., the court should give credence to the evidence favoring the nonmovant, as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Reeves* at U.S. 150-151, S.Ct. 2110.

Justice Ginsberg, in a concurring opinion, agreed that this issue required further review, stating: "I write separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion for judgment as a matter of law. *Reeves* at U.S. 154, S.Ct. 2112. Justice Ginsberg further stated: "...it follows that the ultimate question of liability ordinarily should not be taken from the [trier of fact] once the plaintiff has introduced the two categories of evidence described above.[13] Because the Court's opinion leaves room for such further elaboration in an appropriate case, I join it in full." *Reeves* at U.S. 154-155, S.Ct. 2112.

It is therefore clear from the stated reasoning of the Court in Justice O'Connor's unanimous opinion in *Reeves*, and in the concurrence of Justice Ginsberg in that case, that a further review of this issue is required in order to avoid further confusion, and conflict, arising out of the application of appropriate standards under the ADEA by the lower courts.

II. The existing uncertainty invites the district courts to weigh the evidence, make determinations of credibility, and to fail to draw all inferences in favor of employees when considering an employee's evidence of discrimination, contrary to the standards of summary adjudication.

The Court has recognized the significant difficulties the lower courts have experienced regarding the applicability of the proper standards to ADEA claims coming before them.

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[13]I.e., evidence of a *prima facia* case, and evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false.

See, e.g., *Reeves* at U.S. 141-142, S.Ct. 2105-2106. The difficulty in applying the standards, and the remedial intent and purpose of the ADEA, is recognized to be that "the question facing triers of fact in discrimination cases is both sensitive and difficult," and that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes...". *Reeves* at U.S. 141, S.Ct. 2105, citing *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 75 L.Ed 2d 403 (1983).

After the employee's prima facia case is established, the employer has the burden only of producing, not persuading, with the evidence it advances in support of its claim for non-discriminatory treatment of the employee. The employer is further benefited by the fact that the evidence produced, even though not required to persuade, is subject to no assessment of credibility. *Reeves* at U.S. 142, S.Ct. 2106. It is then up to the employee to "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Reeves* at U.S. 143, S.Ct. 2106.[14]

It is in the melding of the burden of employees being obligated to "prove by a preponderance of the evidence" that the reasons offered by the employer were not its true reasons, but were a pretext for discrimination, with the legitimate protections provided to litigants pursuant to Rules 50, and 56, that confusion necessarily arises. Given the present state of the law, confusion must arise out of the conflict between the employee being obligated to "prove by a preponderance of the evidence" elements of the employee's claim regarding summary adjudication proceedings, when the very standard of such proceedings requires that the district court must draw all

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[14]Citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. At 1089 (1981).

reasonable inferences in favor of the nonmoving party, not make credibility determinations or weigh the evidence, and must disregard all evidence favorable to the moving party that the jury is not required to believe, recognizing that such functions are for the jury, not a judge.

The result of these apparently conflicting standards is that lower courts will invariably develop conflicting caselaw and derivative "standards." Both employees and employers need a well defined and coherent standard to be applied by the district courts regarding this critical area of the law.

III. By improperly weighing the evidence, making determinations of credibility, and failing to draw all inferences in favor of Petitioner, the district court failed to properly apply the standards of summary judgment.

The district court below first applied the *McDonnell Douglas* format, and found that Petitioner had established a prima facia case. Pet. App. 12a-19a.[15]

In accordance with the *McDonnell Douglas* format, the district court then determined that Respondent had produced evidence, not subject to a credibility assessment, that Petitioner had been terminated for "employee abuse," which the district court concluded to also include "high

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[15]The district court's characterization of the five years and eight months age difference between Petitioner and her ultimate replacement as "gossamer" (Pet. App.18a) has no support in the controlling caselaw, as recognized by the district court itself in its opinion. That caselaw notes that an age difference of only three years satisfies this element of a *prima facia* case. Pet. App. 15a-18a.

turnover." Pet. App. 16a. The district court then identified ten separate evidentiary issues regarding which Petitioner had come forward with evidence relating to Respondent's grounds for termination being pretextual, as well as statistical evidence tending to show Respondent discriminated on the basis of age regarding its promotions to RVP, and to area manager positions. The district court then proceeded to review, weigh, and make credibility determinations with regard to each of these factual issues and, in the process of that exercise, failed to draw the inferences that could properly be made from such evidence in favor of the Petitioner in passing upon Respondent's motion for summary judgment. Pet. App. 21a-32a.

The disputed factual matters need not be stated at length. However, with regard to pretext, it is undisputed that Respondent conducted an earlier full investigation regarding claims of "employee abuse" and found such claims to be untrue. It is also undisputed that Respondent claimed that its ultimate termination of Petitioner in January, 1999, resulted from an "investigation" of charges of "employee abuse" in 1998, but produced no record whatsoever of any such "investigation" ever having been conducted. The testimony of Ms. Priestman, upon whom Respondent primarily relies, was directly contrary to claims of "employee abuse." Finally, Respondent offered to transfer Petitioner to a district manager's position which entailed greater, rather than less, interaction with subordinates.

In the face of this substantial evidence the district court stated: "Even if this established pretext with respect to [Respondents] explanation that it discharged [Petitioner] due to complaints about 'employee abuse,' it does not undermine [Respondent's] argument that it also took the challenged employment action because of the high turnover in [Petitioner's] area." Pet. App. 30a. The district court

therefore clearly inferred that a question of fact existed with regard to "employee abuse." As a result, the district court turned to the issue of "high turnover." Pet. App. 30a-31a. However, the district court's cursory review of the objective evidence regarding Respondent's claim of "high turnover" was flawed in that the district court ignored the fact that the actual investigation conducted in 1997 by Mr. Grizzle showed "complaints" against Petitioner to be meritless,[16] and the objective written evidence contained within each of the sixteen exit interviews of departing Manpower employees conducted by Respondent over the entire year of 1998, established that none of those employees indicated they were leaving Manpower because of Petitioner's "employee abuse." Moreover, since Respondent claimed, and the district court opined, that "employee abuse" resulted in "high turnover," the fact that the written exit interviews contradicted this position at the least infers to the contrary, i.e., since the evidence shows that "employee abuse" was not a factor in turnover, it may be reasonably inferred that there was no "employee abuse."

Additionally, there is no evidence that turnover rates were any higher under Petitioner than at any prior, or later, time. To the contrary, both Mr. Grizzle and Ms. Priestman testified that turnover in the Atlanta area was always high, primarily as a result of Respondent's under-compensation of its employees. Petitioner therefore came forward with significant relevant evidence regarding Respondent's claims of "employee abuse," and "high turnover," meeting each "face-on," and creating clear questions of fact as to each.[17]

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[16]They could therefore not have resulted in "high turnover."

[17]The fact that Petitioner voiced a concern regarding turnover in Atlanta, is entirely consistent with her historic attitude as a high-achieving employee, and does not mean that turnover

Finally, the district court rejected the statistical evidence of Respondent's promotion practices on the basis that such statistics needed a further "analytic foundation." Pet. App. 23a-26a. Importantly, the statistical evidence produced by Petitioner related only to the *promotion* practices of Respondent, which were wholly within the control of Respondent. At the summary judgment stage of proceedings it may reasonably be inferred that virtually all of the Respondent's management personnel had an interest in being promoted to higher positions. However, of six promotions to RVP since January 1, 1996, not one was awarded to a person over the age of 49. Similarly, of 36 people who became area managers during that time, only three had reached the age of even 50. While it may be reasonable to require further "analytic foundation" with regard to individuals leaving employment, since factors other than those totally under Respondent's control may arise, such is not the case with regard to promotion practices. Therefore, applying the standards of summary judgment, all reasonable inferences regarding such statistical evidence should have favored the Petitioner.

The order of the district court therefore establishes that the district court improperly weighed the evidence, made determinations of credibility, and failed to draw all inferences in favor of the Petitioner when considering Respondent's motion for summary judgment, contrary to the standards for such proceedings.

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issues were in fact higher, or attributable to her actions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-15764

D. C. Docket No. 99-03371-CV-JOF-1

ELIZABETH WILSON,

Plaintiff-Appellant,

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versus

MANPOWER INTERNATIONAL, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(September 19, 2002)

Before ANDERSON and CARNES, Circuit Judges, and HAND*, District Judge.

PER CURIAM:

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*Honorable William Brevard Hand, U.S. District Judge for the Southern District of Alabama, sitting by designation.

AFFIRMED. See 11th Cir.R. 36-1.[1]

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[1] 11th Cir. R 36-1 provides:

When the court determines that any of the following circumstances exit:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ELIZABETH WILSON,	:	
	:	CIVIL ACTION
Plaintiff,	:	FILE
vs.	:	
	:	NO. 1:99-cv-3371-JOF
MANPOWER	:	
INTERNATIONAL, INC.	:	
	:	
Defendant.	:	

JUDGMENT

This action having come before the court, Honorable J. Owen Forrester, United States District Judge, for consideration of defendant's motion for summary judgment, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendant recover its costs of this action, and the action be, and the same hereby, is **dismissed**.

Dated at Atlanta, Georgia, this 26th day of September, 2001.

LUTHER D. THOMAS
CLERK OF COURT

By: _____S/_____
Andrea Gee, Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
September 26, 2001
Luther D. Thomas
Clerk of Court

By: _____S/_____
Andrea Gee, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ELIZABETH WILSON,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
vs.	:	NO. 1:99-CV-3371-JOF
	:	
MANPOWER INTERNATIONAL, INC.,	:	
	:	
Defendant.	:	

ORDER

This matter is before the court on Defendant's motion for summary judgment [24].

I. Statement of the Case

A. Procedural History

Plaintiff, Elizabeth Wilson, filed the instant action against Defendant, Manpower International, Inc., contending that it unlawfully discharged her on the basis of her age in violation of the Age Discrimination in Employment Act, 29

U.S.C. § 621, *et. seq.* ("ADEA").[1] Defendant timely has filed a motion for summary judgment, asserting that Plaintiff has not established a *prima facie* case of age discrimination or that Defendant's legitimate nondiscriminatory reasons are pretextual. Plaintiff responds that she has established a *prima facie* case of discrimination and that material questions of fact remain as to the issue of pretext.[2]

B. Facts

The following facts are undisputed pursuant to Local Rule 56.1B.[3] Defendant is an employee staffing company

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[1]Plaintiff originally filed the instant action against both Manpower and Douglas Krueger and asserted a multitude of claims. This court allowed Plaintiff to amend her complaint to dismiss Krueger as a defendant and to dismiss all of her claims except for her ADEA claim.

[2]Plaintiff's response to Defendant's motion for summary judgment was 29 pages in length and contained more than 10 characters per inch and thus is not in compliance with Local Rule 7.1D, N.D. Ga. Nevertheless, the court elects to consider Plaintiff's response.

[3]Pursuant to Local Rule 56.1, the court will not consider any fact statements or responses offered by the parties that constitute issues or legal conclusions. *See* LR 56.1B(1), N.D. Ga. Additionally, those of Defendant's fact statements that are not specifically controverted by evidence in the record are deemed

whose philosophy is to "treat people with respect 100 percent of the time, period." Defendant hired Plaintiff in March 1993 to be its Branch Manager in Salisbury, North Carolina. By December 26, 1994, Plaintiff had been promoted to the position of District Manager in North Carolina.[4] Subsequently, Defendant's Southeast Regional Vice President ("RVP"), Carl Grizzle, recommended Plaintiff for the vacant position of Area Manager in Atlanta, Georgia, and after interviewing with Terry Hueneke, Defendant's Executive Vice President, and Douglas Krueger, Defendant's Vice President for U.S. Operations, Plaintiff received the promotion effective April 3, 1995. She was 55 at the time; her date of birth is November 8, 1939. (Pl. Dep., p. 5). The Atlanta area's growth trend in revenue and

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admitted by Plaintiff. *See* LR 56.1B(2-3), N.D. Ga.

[4]Defendant's management structure, as pertinent to the instant case, is as follows:

Vice President - U.S. Operations
Regional Vice President
Area Manager
District Manager
Branch Manager
Service Representative

profit continued under her management.

Defendant received numerous complaints from employees relating to Plaintiff's abusiveness while she was Atlanta Area Manager. Such complaints alleged that employee turnover was a problem, that morale was horrible, and that Plaintiff (1) verbally abused them, (2) was the reason that they were resigning, (3) employed poor management tactics and had poor people skills, (4) was not objective, (5) threw temper tantrums during meetings, (6) was crazy, negative, and degrading to the staff, (6) did not keep conversations confidential, and (7) was unprofessional, micromanaging, and intimidating. In a memorandum to Plaintiff dated March 28, 1997, Grizzle instructed Plaintiff to refrain from micromanaging her subordinates and staff. He advised her to develop greater listening skills and informed her that he had heard her make questionable comments and that several people had brought to his attention comments that she had made. In addition, Defendant paid for Plaintiff to attend a seminar on how to

supervise people.

Defendant suspended Grizzle in late 1997 and discharged him in early 1998. Krueger then began serving as the acting Southeast RVP in addition to his other corporate responsibilities. In a memorandum dated June 4, 1998, Krueger informed Plaintiff that he continued to hear "inferences" from the Atlanta staff of their discontentment and their perception of lack of positive leadership and reinforcement from her. He reminded her to be supportive and to be the leader of the team.

In addition, in a memorandum to Plaintiff dated October 14, 1998, Krueger discussed staff turnover from January through August 1998, and he informed her that her annualized turnover rate of 94% over one year was "significantly higher than the Country" and that it was "difficult if not impossible to grow a market with turnover his high." In a reply memorandum, Plaintiff challenged Krueger's turnover figures and contended that the turnover rate was 66.7%, but she admitted that even under her revised rate, "turnover was too

high." Krueger met with Plaintiff and discussed the high turnover in Atlanta that began when Plaintiff came to Atlanta in 1995. He informed her that Defendant's average annual turnover was 40% to 50% and that Defendant had "higher expectations" of the Atlanta market. Krueger informed Plaintiff that unless things improved, he would have to "make a change" in Atlanta.

Despite the concerns expressed by Grizzle and Krueger, Plaintiff did nothing to change her management style. In the latter part of 1998, Krueger recommended that an investigation be conducted into the situation in Atlanta and that Plaintiff be relieved of her duties. He brought the matter to Hueneke's attention. Hueneke also had been informed by Human Resources about the complaints concerning Plaintiff. David Wescoe, Defendant's Vice President of North America Affairs, dispatched Christine McLaughlin and Kathleen Marcott from Defendant's Human Resources Department to investigate the situation. McLaughlin and Marcott interviewed, among others,

Plaintiff, who spent five hours with McLaughlin and Marcott.

After the results of the investigation were presented to him, Hueneke decided that Defendant should give Plaintiff two options: (1) return to North Carolina as District Manager or (2) leave the company in exchange for a severance package including six months' compensation, her company car, and other benefits. Plaintiff was presented with these two options on January 8, 1999. Plaintiff elected to take the severance package. When a dispute arose as to whether the severance package contemplated that Plaintiff sign a release of claims, Defendant increased its offer to seven months' pay in exchange for the release. In a letter dated February 16, 1999, Plaintiff's attorney stated that Plaintiff would accept this offer. However, after subsequent communications, the parties failed to consummate an agreement. As a result, Plaintiff was separated from the company.

Plaintiff's former job of Atlanta Area Manager remained vacant for approximately 20 months. On September 25, 2000,

Defendant hired Kathy Taylor, age 55, to fill the position. Taylor's date of birth is July 28, 1945. (Johnston Aff., ¶6).

II. Discussion

The ADEA prohibits an employer from discharging or otherwise discriminating against an individual with respect to the compensation, terms, conditions, or privileges of her employment on the basis of her age. 29 U.S. C. § 623(a). Plaintiff admits that she has no direct evidence of age discrimination. Instead, she relies on circumstantial evidence and therefore must establish a *prima facie* case of discrimination by showing that she (1) was a member of the statutorily protected age group between the ages of forty and seventy, (2) was qualified for the job, (3) was subjected to an adverse employment action, and (4) was replaced by someone substantially younger.[5] *Chapman v. AI Transport*, 229 F.3d

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[5]In ADEA cases, the Eleventh Circuit uses the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to evaluate claims based upon circumstantial evidence. *Chapman*, 229 F.3d at 1024. The Supreme Court, however, has not

1012, 1024 (11th Cir, 2000) (en banc); *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1359 (11th Cir. 999), *cert. denied*, 529 U.S. 1109 (2000); *see also Stamey v. Southern Bell Tel. & Tel. Co.*, 859 F.2d 855, 859 (11th Cir. 1988).

There is no dispute that Plaintiff was within the protected age category at the time her cause of action arose or that she was qualified for the position that she held. Therefore, this court turns to whether Plaintiff has established the remaining two elements of her *prima facie* case. Defendant contends that Plaintiff has not shown that she was terminated or discharged as claimed in her pleadings and that she cannot now expand her theory of the case to encompass the broader concept of "adverse employment action." Defendant further asserts that Plaintiff was not replaced by someone substantially younger because her replacement was only four years younger

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addressed squarely whether the *McDonnell Douglas* framework is applicable to cases under the ADEA. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000).

than Plaintiff was at the time Plaintiff left Defendant's employ.

A. Adverse Employment Action

The court finds that this case is similar to *Stamey*, in which the plaintiff's job position had been eliminated and the defendant offered her early retirement or a transfer to another job. 859 F.2d at 858. The defendant did not specify what alternative job the plaintiff might take, but it advised her that whatever job she took would pay less. *Id.* The plaintiff never learned what the other potential jobs were, and in light of the defendant's subsequent actions, she ultimately chose to take early retirement. *Id.* The plaintiff filed suite against the defendant under the ADEA, claiming, among other things, that she unfairly was terminated on the basis of her age. *Id.* At 857. The jury found in favor of the plaintiff on her termination claim and the defendant appealed. *Id.*

In the instant case, once the parties were unable to reach an agreement concerning the options offered to Plaintiff, Plaintiff was separated from the company. The court finds that,

as in *Stamey*, a jury could determine that this constituted a discharge or termination of Plaintiff's employment. Thus, Plaintiff has established the third element of her *prima facie* case.

B. "Substantially Younger" Replacement

The court first notes that despite the initial impression that the age difference between Plaintiff (who as 59 at the time that her cause of action arose) and her replacement, Kathy Taylor (who was 55 when she replaced Plaintiff) is only four years, the actual age difference according to their dates of birth is five years and eight months. In addition, the court notes that the fact that Plaintiff was replaced by a person within the protected age group does not result in an absolute bar to her establishment of a *prima facie* case. *See Eskra*, 125 F.3d at 1411 ("In an ADEA action, the plaintiff is not required to show that the replacement employee was under the age of 40, and outside the protected class."); *see also City of Miami*, 870 F.2d at 583 (eschewing overly strict formula for establishing the

elements of a *prima facie* case, especially in age discrimination cases). Instead, this prong is to be tailored to the individual facts of the case, with the inquiry being whether an ordinary, reasonable person could infer discrimination if the facts presented remained unrebutted. *Id.* For example, in *City of Miami*, the court held that viewing the evidence in the light most favorable to the plaintiff, who was 49 when discharged, the plaintiff had established a *prima facie* case of age discrimination when she had shown that she was replaced by a 46-year-old. *Id.* at 579-80, 583; *see also Damon*, 196 F.3d at 1360 (five-year age difference); *Carter v. DecisionOne Corp.*, 122 F.3d 997, 1003 (11th Cir. 1997) (per curiam) (three-year age difference).[6]

In its reply to its motion for summary judgment, Defendant asserts that *City of Miami* is factually distinguishable

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[6]The Court notes that in its motion for summary judgment, Defendant cites no Eleventh Circuit authority to support its argument that Taylor was not a "substantially younger" replacement; instead, Defendant cites authority from other circuits in support of its argument. Eleventh Circuit authority is controlling on this issue.

from the instant case because in *City of Miami*, the defendant had made a derogatory comment about the protected class.[7] Indeed, in *City of Miami*, there was testimony that the decisionmaker had told his sixty-two-year-old Jewish secretary that he "did not want his office run by 'little old Jewish ladies' like his mother-in-law." 870 F.2d at 580. In contrast, no such evidence has been introduced in the instant case. However, the court does not find this to be a controlling distinction. First, the comments in *City of Miami* was not directed to the plaintiff, and the plaintiff admitted that she perceived the comment to be

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[7]Defendant also has cited a case decided by this court, *Waldemar v. American Cancer Soc'y*, 971 F. Supp. 547 (N.D. Ga. 1996) (Forrester, J.), in support of its position on the "substantially younger" issue. *Waldemar* involved a failure to hire claim concerning a position for which three people were candidates: the plaintiff, age 59; the person awarded the position, age 54; and a third candidate, age 42. *Id.* at 558. This court found that Plaintiff had failed to show a *prima facie* case of age discrimination because the person awarded the position was twelve years older than the youngest candidate and only five years younger than the plaintiff and because the youngest was not awarded the job. Thus, this court in *Waldemar* essentially found that no reasonable person could infer discrimination if the facts presented remained unrebutted. *Id.* Therefore, the court finds that *Waldemar* is not inconsistent with *City of Miami*. Of course, to the extent that *Waldemar* can be construed as being inconsistent with *City of Miami* and its progeny, Eleventh Circuit precedent is controlling.

aimed a **religion and not age**. *Id.* at 582. Second, and most importantly, in finding that the plaintiff had presented a *prima facie* case of age discrimination, the Eleventh Circuit held that viewing the evidence in the light most favorable to the plaintiff, she **at least had shown that she was replaced by a younger person**. *Id.* At 583. Accordingly, it appears that the age difference was the pivotal factor to the appellate court.

Because of this precedent, this court finds that the circuit would find that Plaintiff has established one fourth element of her *prima facie* case. *See Damon*, 196 F.3d at 1360; *DecisionOne*, 122 F.3d at 1003; *City of Miami*, 870 F.2d at 583. However, the court notes that even though Plaintiff has established a *prima facie* case under a mechanical application of *McDonnell-Douglas*, the difference in the ages is so small that any inference of discrimination that can be raised is gossamer.[8]

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[8]Gossamer: infinitely or exquisitely light, delicate, or tenuous. Webster's New International Dictionary 981 (3d ed. 1981).

C. Pretext

Because Plaintiff can be said to have established a *prima facie* case of age discrimination, the burden now shifts to Defendant to articulate a legitimate nondiscriminatory reason for its actions concerning Plaintiff. *Chapman*, 229 F.2d at 1024. This burden is merely one of production, not persuasion, and it involves no credibility assessment by the court. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000). Defendant has offered evidence that its actions were based on chronic employee relations problems attributable to Plaintiff as reflected by the complaints received about her as well as morale and high turnover in her area. The court finds that Defendant has met its burden and that the presumption of discrimination drops from the case. *See id.; Chapman*, 229 F.2d at 1024. Plaintiff now must come forward with "significantly probative evidence that the proffered reason is a pretext for discrimination." *City of Miami*, 870 F.2d at 584. She may do this by directly persuading the court that Defendant more likely

was motivated by a discriminatory reason or by indirectly showing that the employer's explanation is not believable.[9]

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[9]A plaintiff's *prima facie* case in conjunction with evidence sufficient to allow a reasonable factfinder to find that the defendant's asserted reason is false, **may** support a determination that the defendant unlawfully discriminated against the plaintiff. *Reeves*, 530 U.S. at 148 (2000). Prior to the decision in *Reeves*, the Eleventh Circuit had held that judgment as a matter of law was unavailable to a defendant once the plaintiff had presented sufficient evidence of pretext as to each of the defendant's legitimate, articulated reasons. *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997). In *Chapman*, an *en banc* Eleventh Circuit recognized that *Reeves* modified its previous decision in *Combs* such that judgment as a matter of law and summary judgment sometimes will be available to a defendant in such a case. *Chapman*, 229 F.3d at 1025 n. 11. Thus, pursuant to *Reeves*, a plaintiff may not be entitled to take her case to a jury even if the she presents sufficient evidence that the defendant's articulated reasons are pretextual. *Id.* This conclusion flows from the caveat in *Reeves* that a sufficient showing of pretext will not **always** entitle a plaintiff to a jury verdict in her favor. 530 U.S. at 148. The Court in *Reeves* recognized that there would be instances where despite the plaintiff's evidence of pretext sufficient to reject the defendant's explanation for the challenged employment action, "no rational factfinder could conclude that the action was discriminatory." *Id.* The court posited that

> [f]or instance, an employer would be entitled to [summary judgment] if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Id.

Id.

In support of her argument that Defendant's articulated reasons for the challenged employment action are pretextual, Plaintiff contends that: (1) the complaints against her were untrue; (2) Grizzle and Krueger knew that they were untrue; (3) she was an exemplary employee with outstanding revenue and profit results; (4) statistical evidence shows that Defendant discriminates on the basis of age; (5) Grizzle instructed her to be aggressive in her job; (6) the timing of several of Defendant's recent hires evidences pretext; (7) there was no written report of the investigation conducted by McLaughlin and Marcott; (8) there was a one-year lapse in complaints; (9) the offer to become District Manager is suspect in light of the claims of "employee abuse" because a District Manager interacts with the lower level employees more often than does an Area Manager; and (10) no one discussed their concerns about her actions with Plaintiff. For the reasons set forth below, the court finds that Plaintiff has not presented this court

with sufficient evidence of pretext and that therefore her case does not survive Defendant's motion for summary judgment.

1. Attempts to Second-Guess Defendant's Business Judgment

In order to establish that Defendant's reasons for the challenged employment decisions were pretextual, Plaintiff must meet Defendant's proffered reasons "head on" and cannot show pretext merely by questioning the perspicacity of Defendant's business judgment. *Chapman*, 229 F.2d at 1030. Some of Plaintiff's arguments purporting to evidence pretext merely are attempts to show that she was not abusive to her employees. However, it is irrelevant to the determination of pretext whether the complaints against Plaintiff were true; all that matters is that Defendant believed that the complaints were true and was motivated by them. *See Elrod v. Sears Roebuck & Co.*, 929 F.2d 1466, 1470 (11th Cir. 1991) ("We can assume..that the complaining employees...were lying through their teeth."). In addition, Plaintiff's argument that she was an exceptional Area Manager who continually posted superb performance results

and received three raises during her tenure as Atlanta Area Manager does not undermine Defendant's stated concerns regarding the complaints it received about Plaintiff's abusive behavior and the high level of turnover in the Atlanta are. *See Chapman*, 229 F.3d at 1031 ((finding that plaintiff's good performance appraisals and loyalty to client did not undermine defendant's stated concern precipitating employment action). Instead, such evidence amounts to an attack on the wisdom of Defendant's actions and does not constitute evidence of pretext.

2. Statistical Evidence

Plaintiff also attempts to present informal statistical evidence of pretext. She argues that since January 1, 1996, not one of the six promotions from Area Manager to RVP was awarded to a person age 50 or older. (Hueneke Dep., p. 92; Krueger Dep., Ex. 2 at 0358). She points to evidence that of the 36 people who have become Area Managers since January 1, 1996, only three have reached the age of 50. (*Id.* at 105; Krueger Dep., Ex. 2 at 0360-0363). Finally, she cites evidence

that between January 1, 1996 through May 2, 2000, fourteen Area Managers over the age of 50 ended their employment with Defendant. (Hueneke Dep., Ex. 62).

Statistical evidence may be used to demonstrate pretext. *Brown v. American Honda Motor Co.*, 939 F.2d 946, 952 (11th Cir. 1991). However, statistics without analytic foundation mean nothing. *Id.* The first problem with Plaintiff's proposed evidence of pretext is that she has provided this court with no evidence of the factors or qualifications that Defendant looked at in making the promotions to RVP and Area Manager, nor has she presented evidence as to who applied for such promotions or was interested in those jobs. In addition, with respect to those employees who ended their employment with Defendant, Plaintiff has provided this court no evidence of the reason why their employment ended - that is, whether they were terminated by Defendant or voluntarily retired. In short, Plaintiff has provided this court with no context for her figures such that the data do not constitute sufficient evidence that

Defendant's proffered reasons for its actions are pretextual. *See Lee v. GTE Fla., Inc.*, 226 F.3d 1249, 1255 n. 2 (11th Cir. 2000), *cert. denied,* 121 S. Ct. 1486 (2001) (finding data to be statistically meaningless because the plaintiff "has provided no specific context against which to measure these briefs facts"); *Watkins v. Sverdrup Tech., Inc.*, 153 F.3d 1308, 1314-15 (11th Cir. 1998) (finding data lacked specificity, sufficient depth, and probative value to constitute evidence of pretext); *Brown*, 939 F.2d at 952 (finding that statistics regarding racial discrimination do not "say a great deal about [defendant's] practices unless we know how many blacks have applied and failed and compare that to the success rate of equally qualified white applicants.").

Plaintiff's second problem with this data is that it does nothing to undermine Defendant's articulated reason for the challenged employment action. At the pretext stage, Plaintiff's evidence must rebut directly Defendant's evidence that it discharged Plaintiff due to employee complaints about her and

due to the high level of turnover in her area. *See Chapman*, 219 F.3d at 1030. Plaintiff's data regarding the promotions and separations from the company, however, are in no way tied to the actions taken by Defendant with respect to Plaintiff. For example, they do not show that younger employees about whom Defendant had received numerous complaints had not been discharged from the company while older similarity-situated employees had been discharged. Thus, Plaintiff's data would not amount to evidence of pretext even if it had analytic foundation.

3. Timing of New Hires

Plaintiff argues that Defendant did not hire her replacement until 20 months after her discharge and one day after the close of discovery in the instant case. She further asserts that of the three individuals over the age of 50 to become Area Manager since January 1, 1996, one was Barb Bononi, who was 60 years old when she was hired and was hired four days after Plaintiff's suit was filed. In addition,

Plaintiff asserts that Ms. Bononi was an "outside" hire, in contravention of the company's policy of promoting from within. Again, however, Plaintiff has not tied the timing or nature of these actions to the stated reason for her discharge. "Standing alone, deviation from a company policy does not demonstrate discriminatory animus." *Mitchell v. USBI Co.*, 186 F.3d 1352, 1355-56 (11th Cir. 1999) (per curiam). The fact that a person over age 50 eventually replaced Plaintiff and/or was hired from the outside to become an Area Manager does not discredit Defendant's stated reasons that its actions toward Plaintiff were based on the complaints it received about her abusive behavior and the high level of turnover in her area.

4. Lapse Between Complaints

Plaintiff argues that there was a one-year lapse between the last complaint received while Grizzle was Southeast RVP and the first complaint received while Krueger was acting as temporary Southeast RVP. The court finds that this evidence is not significantly probative of pretext as it does nothing to

undermine Defendant's stated reasons for its actions. Plaintiff does not deny that complaints were made while Grizzle was Defendant's Southeast RVP. Plaintiff does not deny that Krueger later received complaints while acting as Southeast RVP. Thus, the fact that there was a lapse in time between the first batch and the second batch of complaints received does not cast doubt on the fact that Defendant received numerous complaints about Plaintiff and acted on the basis of these complaints.

5. Knowledge of Veracity of Complaints

Plaintiff contends that Grizzle and Krueger knew that the complaints received about her while Grizzle was Southeast RVP were untrue. Indeed, the record supports her contention that Grizzle either discounted the complaints or investigated them and found them to e meritless and communicated his conclusions to Krueger. Grizzle Dep., pp. 181-182; 191-97. However, Krueger did not always believe everything as Grizzle interpreted it. Krueger Dep., p. 157. Furthermore, Krueger

received additional complaints **after** Grizzle was fired and recommended that an investigation be conducted into the complaints. Thereafter Krueger took no part in the investigation of or decisions pertaining to Plaintiff. Krueger Dep., pp. 48-49; 54; 69-70; Hueneke Dep., pp. 75-78.

Pursuant to the results of the investigation conducted by McLaughlin and Marcott, **Hueneke** made the decision to remove Plaintiff as Atlanta Area Manager. Plaintiff has provided no evidence that **Hueneke** disbelieved the complaints filed about Plaintiff. As such, Plaintiff has not presented any evidence that the **decisionmaker** did not believe that there was a problem regarding Plaintiff's treatment of her subordinates. Likewise, Plaintiff's argument that Defendant's asserted reasons are pretextual because there is no documented written report of the investigation does not undermine the evidence that Hueneke believed the oral report presented to him and acted on the basis of that report.

6. Remaining Arguments Directed to Claims

that Plaintiff was Abusive.

Plaintiff's assertions that she merely was following Grizzle's instructions about how to act as Area Manager and that no one discussed their concerns about her actions with her are belied by her own admissions. Both Grizzle and Krueger discussed with Plaintiff the fact that complaints had been made about her and advised her to be more supportive and less micromanaging of her subordinates.

Plaintiff attests that the offer to transfer her to District Manager in North Carolina evidences pretext because this job would entail more interaction by her with subordinates. Wilson Aff., ¶ 19. Even if this established pretext with respect to Defendant's explanation that it discharged Plaintiff due to complaints about "employee abuse," it does not undermine Defendant's argument that it also took the challenged employment action because of the high turnover in Plaintiff's area.[10] Plaintiff argues that turnover always was high in her

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[10]Plaintiff's only "evidence" of turnover in Atlanta prior to her becoming the Atlanta Area Manager is testimony to the effect

area but has provided this court with no evidence of the turnover history in the Atlanta area prior to her becoming the Area Manager. On the other hand, Plaintiff admitted that the turnover figure was 66.7% during at least part of her tenure as Atlanta Area Manager, a figure which even she acknowledged was too high.

Accordingly, because Plaintiff has failed to discredit **both** legitimate, nondiscriminatory reasons proffered by Defendant, the court finds that Defendant's motion for summary judgment must be GRANTED. *See Chapman*, 229 F.2d at 1024-25 (instructing that if the plaintiff does not offer sufficient evidence that **each** of the defendant's legitimate articulated reasons is pretext, then the defendant is entitled to summary judgment); *see also Watkins*, 153 F.3d at 1317 n.18 (finding that because the plaintiff had not shown evidence of

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that turnover always had been very high in Atlanta and that there is a lot of turnover in the temporary services industry. Grizzle Dep., p. 60-61; Priestman Dep., pp. 42-45. Plaintiff, however, has presented this court with no evidence of the actual turnover rate in the Atlanta area before she assumed the Atlanta Area Manager position.

pretext for one of the defendant's proffered reasons, the court did not need to discuss the defendant's remaining proffered reasons for its actions).

III. Conclusion

In accordance with the foregoing, Defendant's motion for summary judgment [24-1] is GRANTED.

SO ORDERED this 25th day of September 2001.

S/
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

Entered on Docket
September 26, 2001
by LDT Clerk
Deputy Clerk

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 14–AGE DISCRIMINATION IN EMPLOYMENT

29 U.S.C. § 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that–

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens, commerce and the free flow of good in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find

ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 623. Prohibition of age discrimination.

(a) Employer practices

It shall be unlawful for an employer–

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Remainder of statute inapplicable.

Supreme Court, U.S.
FILED
JAN 16 2003

No. 02-934

In The

Supreme Court of the United States

ELIZABETH WILSON,

Petitioner,

v.

MANPOWER INTERNATIONAL, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF REASONS FOR NOT GRANTING THE WRIT 17

ARGUMENT 18

I. PETITIONER'S FAILURE TO OFFER EVIDENCE REBUTTING RESPONDENT'S LEGITIMATE, NON-DISCRIMINATORY REASONS MAKES THIS CASE AN INAPPROPRIATE VEHICLE TO DEFINE THE CIRCUMSTANCES IN WHICH PLAINTIFFS WILL BE REQUIRED TO SUBMIT EVIDENCE BEYOND THAT FROM WHICH A FACT-FINDER COULD CONCLUDE THAT AN EMPLOYER'S PROFERRED REASONS ARE FALSE 18

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STATEMENT OF THE CASE

A. PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA AND THE ELEVENTH CIRCUIT COURT OF APPEALS

On January 4, 2000, Petitioner filed suit against Respondent and Douglas Krueger in the United States District Court for the Northern District of Georgia. R1-1.[1] She thereafter amended the Complaint, dismissing the individual defendant and retaining only the ADEA claim against Respondent. R1-18. After the close of discovery, Respondent filed a timely motion for summary judgment. R1-24. Petitioner filed a brief in opposition (R2-31), to which Respondent filed a timely reply. R3-35. On September 26, 2001, the District Court granted the motion. On October 11, 2001, Petitioner appealed to the Eleventh Circuit Court of Appeals. Following oral argument on September 10, 2002,[2] the Eleventh Circuit Court of Appeals affirmed the judgment of the District Court, *per curiam*, on September 19, 2002.

B. STATEMENT OF THE FACTS

Respondent is an employee staffing company that provides other employers with employees for temporary work assignments. 1SR-Wilson Dep. at 19. Respondent's

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[1] Unless otherwise noted, all citations are to the record before the Eleventh Circuit Court of Appeals.

[2] During oral argument before the Eleventh Circuit panel, the Chief Judge asked counsel for the Respondent if Respondent had sought an award of attorneys' fees in the District Court. Counsel for Respondent answered in the negative, but only because the law does not permit an award of attorneys' fees in an ADEA case. 29 U.S.C. § 216(b). The panel's question does, however, reflect just how weak Petitioner's case is.

philosophy is to "treat people with respect 100 percent of the time, period." 1SR-Grizzle Dep. at 120.

1. Respondent Hires and Promotes Petitioner

On December 1, 1993, Petitioner began working for Respondent as the branch manager of its Salisbury, North Carolina branch. 1SR-Wilson Dep. at 19, 22. At the time of her hiring, Petitioner was 53 years old.[3] *Id.* at 5. Petitioner was hired by Lynda Bowman, the Charlotte, North Carolina area manager. *Id.* at 15-16. Bowman was born on April 8, 1940, and is 61 years old. 1SR-Bowman Dep. at 5, 74. By December 26, 1994, Petitioner had been promoted to be a district manager in North Carolina. 1SR-Wilson Dep. at 22. Subsequently, Respondent's Southeast Regional Vice President, Carl Grizzle, recommended Petitioner for the vacant position of Area Manager in Atlanta, Georgia. 1SR-Grizzle Dep. at 53-54. After interviewing with Terry Hueneke, Respondent's Executive Vice President, and Douglas Krueger, Respondent's Vice President for U.S. Operations, Petitioner received the promotion effective April 3, 1995. 1SR-Wilson Dep. at 23, 36-37. She was 55 years old. *Id.*

2. Respondent Receives Numerous Complaints About Petitioner

After Petitioner became the area manager in Atlanta, Respondent began receiving complaints about Petitioner from its employees. The employees complained that employee turnover in Petitioner's area was very high, that morale was terrible, and that Petitioner (1) verbally abused them, (2) was the reason they were resigning, (3) employed poor management tactics and had poor people skills, (4) was not objective, (5) threw temper tantrums

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[3] Petitioner's birthdate is November 18, 1939.

during meetings, (6) was crazy, negative and degrading to the staff, (7) did not keep conversations confidential, and (8) was unprofessional, micromanaging, and intimidating. R3-37-3.

a. Diana Haas

For example, on October 23, 1995, Diana Haas, an eight-year veteran of Respondent, resigned. 1SR-Wilson Dep. Ex. 17. Hass' resignation letter to Petitioner states, "I will not be subjected to the humiliation of having you [Petitioner] tell my downtown staff, in my presence, why I am leaving them." *Id.*

b. Pamela Barkley

During her exit interview in January 1996, Barkley complained about Petitioner's treatment of her. 1SR-Wilson Dep. Ex. 15. Barkley's signed interview summary states:

> [Petitioner] shut the door and berated [Barkley] and the Branch Manager in a vociferous manner, loud enough to be heard by the Service Representatives in the outer office . . . . This was not the only less than professional treatment I received. On more than one occasion [Petitioner] told me during conversations (or perhaps they were lectures) to 'hush.' It has always been my understanding that every [employee of Respondent] be treated with respect; however, I do not feel respect has been shown to me or to others in the Atlanta complex.

Id.

c. Vallerie Brown

On August 9, 1996, in connection with her decision to resign from Respondent, Brown wrote a letter to the President of Respondent in which she stated:

> I resigned on Aug. 2, 1996. There was only one reason for my doing this, [Petitioner]. The Atlanta Complex has had continuous turnover and if asked, the staff would say the cause was [Petitioner]. The Atlanta Complex will continue to experience these high levels of turnover unless [Petitioner] is trained in people skills, relocated, or permanently removed.

1SR-Wilson Dep. Ex. 19.

Brown's letter also describes an incident in which an employee accidentally opened a letter addressed to Petitioner. *Id.* When Brown informed Petitioner who opened the letter, Petitioner screamed at Brown and threatened that if either the employee or Brown did so again, they would be fired. *Id.* In notifying Grizzle about Brown's letter, Krueger wrote, "this is an official complaint, we need to officially respond." *Id.* Krueger took the complaint "very seriously because he put the word official out there." 1SR-Grizzle Dep. at 129.

d. Else Henry

In her resignation letter dated November 9, 1996, Henry describes several unpleasant confrontations with [Petitioner]. 1SR-Wilson Dep. Ex. 18. The letter begins, "This letter is to serve as a formal complaint against [Respondent]." *Id.* In the letter, Henry complains that Petitioner "lashed out" at her and characterizes Petitioner's behavior as "inexcusable" and "completely unprofessional and inappropriate." *Id.* Henry sent the letter to a number of Respondent's managers and to the Better Business Bureau. *Id.*

e. Susan D'Arezzo

In her resignation letter dated February 18, 1997, D'Arezzo states that:

> There are major problems in the Atlanta complex. *There are new employees who are on the*

> *verge of leaving their positions, and morale is low*. The method of micromanaging being applied has become more of a burden than a benefit and causes a loss in productivity along with accountability. . . . I feel I *have become another of [Petitioner's] targets*, and it makes no sense for me to deal with that on top of the many other duties and responsibilities required by my position. *The situation is causing me to become ill*, and my health is too important to allow this to happen.

1SR-Wilson Dep. Ex. 20 (emphasis added).

f. Elizabeth Evers

Elizabeth Evers, another employee who worked under Petitioner, also complained about and to Petitioner in writing. 1SR-Wilson Dep. Ex. 22. Evers' memorandum states:

> As much as I appreciate your [Petitioner's] constructive criticism, I resent being called a liar . . . never lied to you about anything. After that comment in our conversation I felt unjustly slammed. I consider being called a liar as a personal assault on my character.

Id.

On June 10, 1997, Petitioner sent Grizzle a memorandum about another incident she had with Evers:

> [T]oday in the mist [sic] of a confrontation . . . my temper got the best of me and some of my comments may not have been appropriate – [sic] I was/am angry at myself as I should have recognized the 'set-up.' I may owe you and [Respondent] an apology over this incident.

Id.

Petitioner never apologized to Evers. 1SR-Wilson Dep. at 70.

g. Mary Heekin

Another employee, Mary Heekin, sent a strongly worded letter in connection with her decision to resign from Respondent. 1SR-Wilson Dep. Ex. 25. Heekin's letter states in part:

> I want to let you know first hand of the unacceptably low level of morale amongst the employees due mainly to the exceptionally poor management tactics of [Petitioner]. I say in all sincerity that I have never been employed by an organization where an individual in any type of leadership role has had such a dramatically negative effect on the employees as a whole.

Id. (emphasis added).

h. Anonymous Complaints

Respondent also received anonymous complaints from employees about Petitioner. On June 3, 1997, Respondent received a letter via facsimile that states:

> Dear Mr. Krueger:
>
> I am a Service Representative in the Atlanta Complex. I cannot identify myself because I am in fear of loosing [sic] my job if I do. I have seen it happen to others. The Atlanta Complex is in trouble. *Surely you have had complaints and are aware of our problems.* Why hasn't something been done? *[Petitioner] is a cruel person and is constantly on someone.* I understand that we have business to conduct, however, abusing people verbally is not the way to enhance attitude to work as a team and get more business. Please help us. If my manager walks, we will too. *We are afraid of her [Petitioner]. She yells, flies off at people for no reason and has even thrown things.* Attitude is everything and we are at our wits [sic] end as to what to do.

Sincerely,

Someone who wants to stay with [Respondent].

1SR-Wilson Dep. Ex. 23 (emphasis added).

Another anonymous employee sent an "urgent fax" on June 16, 1997 that states:

> Help!
>
> *Atlanta is burning and [Petitioner] is both the match that lit the fire and the fan that keeps it burning. We need help from the home office! Carl Grizzle must be protecting her* because I can not imagine anyone allowing an area manager to repeatedly be *the primary reason good people keep leaving in Atlanta* and not investigate the problem. Morale is horrible here. *You are about to lose several more good people in Atlanta because of frustration directly caused by [Petitioner].* Most will not come forward because they have no confidence that anything will be done and so it would probably only make things worse. *When they do leave they don't tell the real reason in the exit interview because they are usually with her* and by then their decision to leave is made and it doesn't matter anymore. . . .
>
> FROM SOMEONE WHO CARES IN ATLANTA

1SR-Wilson Dep. Ex. 24 (emphasis added).

i. William Tasillo

According to Petitioner, another management employee who resigned, William Tasillo, also sent a letter to the President of Respondent expressing dissatisfaction with Petitioner. 1SR-Wilson Dep. at 160-161. Apparently the letter was not retained; otherwise, it would have been included among the many other complaints that Respondent received about Petitioner.

3. Petitioner Attempts To Address The Problem

Based on the number and severity of the complaints Respondent was receiving about Petitioner, Grizzle (Petitioner's immediate superior) finally took action. In a memorandum to Krueger dated March 17, 1997, Grizzle said: "I will be in Atlanta most of all next week. I plan to spend considerable time with [Petitioner] going over my concerns about her management style." 1SR-Wilson Dep. Ex. 20. Grizzle also wrote Petitioner a memo dated March 28, 1997. 1SR-Wilson Dep. Ex. 21. In the memo, Grizzle discusses Wilson's "micro-managing/[o]ver-managing" of her staff, and her need to develop greater listening skills. *Id.* Grizzle's memo further states:

> Elizabeth, you're a smart person, but on a number of occasions *I have heard you make some comments, that had you thought a bit more about, you probably would not have made. This will get you in trouble* with some people if they read your comments the wrong way. *Several individuals have brought this to my attention over the past year or so.* If you isolate managers, service staff, or customers, *oftentimes there is no recovery.*

Id. (emphasis added). Grizzle also spoke to Petitioner in person and told her that she needed to be more careful about how she spoke to her subordinates.[4] 1SR-Grizzle Dep. at 150.

Not only did Grizzle receive more complaints about Petitioner than any other area manager (*Id.* at 164), he also personally witnessed her get "out of control" once or twice. *Id.* at 179. On two occasions, managers told Grizzle that Petitioner spoke "harshly" to people. *Id.* at 190. Grizzle characterizes Petitioner's "management style . . .

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[4] This evidence from the record belies Petitioner's assertion that Grizzle "conducted a full investigation of those 'complaints' and found them to be meritless." Pet. For Writ Of Cert. ("Petition" or "Pet.") at 4.

as something less than friendly, . . . maybe she was too aggressive" which is why "she kind of [sic] rubbed off on [sic] people the wrong way." *Id.* at 110-111. D'Arezzo, a 12-year veteran of Respondent, resigned "because of some differences with [Petitioner]," even though Grizzle asked D'Arezzo to stay. *Id.* at 140. In addition to counseling Petitioner orally and in writing as described above, Grizzle also arranged for Petitioner to attend a seminar, at Respondent's expense, on "How to Supervise People." *Id.* at 150; 1SR-Wilson Dep. Ex. 21.

Petitioner was fully aware of the complaints about her. On October 6, 1997, she sent a memorandum to Grizzle stating, "It seems that the people who are heard are the ones who resign, write letters or make phone calls." 1SR-Wilson Dep. Ex. 27. Petitioner's memorandum also refers to a "conspiracy" against her by ex-employees of Respondent. *Id.*

4. Respondent Discharges Grizzle For Sexual Harassment

In late 1997, Grizzle, Petitioner's direct supervisor, was suspended, and in early 1998, Respondent discharged him due to allegations of serious sexual harassment. 1SR-Grizzle Dep. at 94, 98, 177. Krueger, the Vice President of U.S. Operations in Milwaukee, began serving as acting regional vice president for the Southeast, in addition to his regular duties, until a replacement for Grizzle could be found. 1SR-Wilson Dep. at 95.

5. Complaints About Petitioner Continue

The complaints about Petitioner continued after Grizzle's discharge.

a. Geri Priestman

Geri Priestman, age 56, was a district manager in Atlanta working under Petitioner. 1SR-Priestman Dep. at

13, 146. In May 1998, Priestman telephoned Krueger to complain about Petitioner. *Id.* at 69, 80. Priestman confided to Krueger that she might resign because of the way Petitioner was treating her. *Id.* at 148.

Approximately one month later, in June 1998, Priestman again contacted Krueger to notify him that Petitioner had referred to Krueger in Priestman's presence as an "S.O.B. coward." *Id.* at 97. Priestman further reported to Krueger that Petitioner had said that she [Petitioner] knew someone was feeding information to Krueger, and if Petitioner found out who it was, she [Petitioner] would get even. 1SR-Priestman Dep. at 103. Priestman put this information in writing. 1SR-Priestman Dep. Ex. 65.

Priestman continued to communicate with Krueger about Petitioner's conduct. 1SR-Priestman Dep. at 79-80. At various times, she notified Krueger that she and others were afraid of Petitioner, that Petitioner intimidated people, that morale was terrible, that Petitioner was very negative, that employees in Atlanta were very disheartened, that Petitioner did not visit branch offices, that Petitioner's attitude was "I am the boss," that Petitioner degraded the office staff, and that Petitioner had once said, "I want to go back to North Carolina so they can run it themselves." *Id.* at 127; 1SR-Krueger Dep. Ex. 55.

Even though she had not been treated previously for stress, Priestman sought medical treatment because she could not sleep. 1SR-Priestman Dep. at 118. Priestman was prescribed and began taking Paxil, an antidepressant, in order to help her cope with the situation at work.[5] *Id.* at 123, 149.

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[5] This testimony, with numerous citations to the record, seems at odds with Petitioner's assertions in her Petition that Priestman's deposition testimony was "[c]ontrary to Respondent's claims of 'employee abuse'. . . . " Pet. at 5. In any event, there is no dispute that employee abuse is what Priestman reported to Krueger.

b. Harold Schwartz

In June 1998, Respondent was in the process of recruiting Harold Schwartz, a candidate from outside the Company, for a technical manager opening in Atlanta. 1SR-Wilson Dep. Ex. 37. After interviewing with Petitioner, Schwartz withdrew his name from consideration. *Id.* Krueger contacted Schwartz to find out why, and Schwartz told Krueger that the interview with Petitioner "did not go well and he was turned off by it." *Id.* Schwartz also said that he had contacted some former employees of Respondent and that those conversations made him decide that there was "too much opportunity in Atlanta to put up with the management style that was described to him." *Id.*

c. Kathi Badal

In late 1998, Badal resigned from Respondent in Atlanta. 1SR-Wilson Dep. Ex. 48. Krueger telephoned Badal to find out why. *Id.* Badal cited a number of reasons, including lack of guidance, lack of direction, high turnover, low morale caused by feeling "threatened and insecure," and the need for Petitioner to be far more visible – "not for instructions, but just support." *Id.*

d. LuAnn Budd

Another one of Respondent's managers in Atlanta, LuAnn Budd, also complained about Petitioner. Budd telephoned Krueger and told him that working in Atlanta "has been absolutely hell" since Petitioner arrived, that Petitioner "talks negative about Pam Krueger, Jim Haughsland and Doug Krueger at every turn," that Petitioner is "absolutely crazy," that Petitioner is intimidating and scary, that Petitioner "yells about reports" during meetings, has temper tantrums, and intimidates and threatens employees. R1-24 App. Budd Aff. ¶ 6. On one occasion, Petitioner yelled so loudly at Budd that

Priestman intervened when she heard Budd crying. 1SR-Priestman Dep. at 88. Budd still has nightmares about Petitioner. *Id.* R1-24 App. Budd. Aff. ¶ 11.

e. Another Anonymous Complaint Letter

On July 20, 1998, Krueger received another anonymous complaint letter about Petitioner.[6] 1SR-Wilson Dep. Ex. 41. The letter states that Petitioner and Priestman are ruining Respondent's Atlanta market. *Id.* The author of the letter says that going to work is like "going to battle" with "Dr. Jeckle [sic] and Mrs. Hyde." *Id.* The letter further describes Wilson as not objective, not visible to employees, not trustworthy, and the source of numerous resignations. *Id.* The letter further predicts that Respondent will lose customers if "we have turnover in the magnitude that we have in the last year" because "customers get very frustrated when they call an office and everyone they are familiar with is no loner [sic] with the organization." *Id.*

6. Krueger's Attempts To Counsel Petitioner

Petitioner considered her relationship with Krueger, whom she had called an "S.O.B. coward"[7], to be strained and unpleasant. 1SR-Wilson Dep. at 136. After Krueger visited Atlanta in May 1998, Petitioner sent him a memorandum in which she stated, "My comments during the drive to the airport were out of line and I apologize." 1SR-Wilson Dep. Ex. 35. Following another Krueger visit in June 1998, Petitioner wrote to Krueger, "I am sorry I

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[6] Petitioner was aware of the letter, which she believes was sent by an employee of Respondent by the name of Regina Davis. 1SR-Wilson Dep. at 109-110.

[7] While Petitioner denies using this term in reference to Krueger (1SR-Wilson Dep. at 94), she has no basis for denying that this is what Priestman reported to Krueger.

offended you with my statement about lack of support." 1SR-Wilson Dep. Ex. 38. As early as November 1997, Petitioner had concluded that Krueger did not want her in Atlanta. 1SR-Wilson Dep. at 128.

On June 4, 1998, Krueger wrote the following to Petitioner:

> I continue to hear inferences [sic] from Atlanta staff of discontentment [sic] and what they perceive as a lack of positive leadership and reinforcement from you. We've had long discussions in the past concerning your need to be viewed as supportive and the leader of the team. It has improved, but the perception generally is still there.

1SR-Wilson Dep. Ex. 36. Krueger's memo to Petitioner further states that he is aware that Petitioner wants to leave her position in Atlanta and observes that a job change would be in both Petitioner's and Respondent's best interests. *Id.* The memo explains that Krueger is working towards that goal, that he hopes Petitioner will be "patient with that process," and that he hopes "to be able to offer [her] something to [her] liking." *Id.*

On October 14, 1998, Krueger sent Petitioner a memo addressing the issue of high employee turnover in the Atlanta market. 1SR-Wilson Dep. Ex. 49. Krueger calculated that if turnover continued at the same rate through the end of 1998, total annual turnover would be 94%. *Id.* Petitioner sent a reply memorandum, questioning Krueger's figures, and stating that employee turnover would be 66.7% by year-end. 1SR-Wilson Dep. Ex. 50. Petitioner nevertheless admitted that "turnover was too high." *Id.* Replying to Petitioner's figures, Krueger pointed out that even using her figures, the annualized employee turnover rate would be 77%. *Id.* In one meeting with Petitioner, Krueger shared with her the fact that average turnover at Respondent was approximately 40-50%, and observed that the high turnover had begun in 1995, when

Petitioner first arrived in Atlanta. 1SR-Wilson Dep. at 114-116. Krueger told Petitioner that he, Fromstein (Respondent's President), and Hueneke (Executive Vice President) had higher expectations for the Atlanta market. *Id.* at 116.

Also in October 1998, Krueger gave Petitioner a copy of the "Customer Satisfaction" report for the business areas in the Southeast region, including Atlanta. *Id.* at 142. The report measures the level of customer satisfaction (or dissatisfaction) within Respondent's service areas. Of the seven business areas in the Southeast, Atlanta was rated *last* in *all ten categories* and was "significantly lower than the mean of all other regions." 1SR-Wilson Dep. Ex. 53. Petitioner says she was disappointed with the results. 1SR-Wilson Dep. at 144.

Eventually Krueger and Petitioner "had a pretty serious talk about the market" during which Krueger warned Petitioner that, under the circumstances, unless things changed, Petitioner "will not be here." *Id.* at 117. Despite all this, Petitioner did nothing to change her management style. *Id.* at 157.

7. Respondent Investigates The Situation In Atlanta

Around September 1998, Petitioner contacted David Wescoe, Respondent's Vice President of North American Administration in Milwaukee, because of her difficulties with Krueger. *Id.* at 126.

Also in late 1998, Krueger recommended to Terry Hueneke, Respondent's Executive Vice President, that Respondent conduct an investigation into the situation in Atlanta due to "the severe problems we were having with the staff in Atlanta." 1SR-Krueger Dep. at 48-49; 1SR-Hueneke Dep. at 74-75.

Respondent sent two employees from Milwaukee to investigate, Christine L. McLaughlin, an attorney in the Human Resources Department, and Kathleen Marcott, another employee in Human Resources. 1SR-Wescoe Dep.

at 30. Budd and Priestman both met with the investigators from Milwaukee and reiterated their previous grievances about Petitioner's conduct in greater detail. R1-24 App. Budd Aff. ¶ 7; 1SR-Priestman Dep. at 110-111. McLaughlin and Marcott met also with Petitioner, a meeting which Petitioner says lasted for approximately five hours. 1SR-Wilson Dep. Ex. 56. Wilson later expressed concern that some of her investigators' "questions related to statements dating back prior to 1997." *Id.*

After the investigation was concluded, Hueneke decided that Respondent should offer Petitioner two options: (1) return to North Carolina as a district manager under the supervision of her previous mentor, Lynda Bowman, or (2) leave Respondent's employ with a separation package consisting of six months pay, be given her company car, and relocate back to North Carolina at Respondent's expense. 1SR-Hueneke Dep. at 86, 1SR-Wilson Dep. at 170-171. Petitioner's "ultimate goal" had been to return to North Carolina, where she still owned a home. 1SR-Wilson Dep. at 83. Respondent contacted Bowman before offering the position to Petitioner to make sure that Bowman would be willing to have Petitioner back in her area. 1SR-Bowman Dep. at 68. Bowman agreed, and telephoned Petitioner to encourage her to accept the assignment. 1SR-Wilson Dep. at 174. It was Petitioner's understanding that under company policy she would experience no reduction in salary. *Id.* at 171.

On January 8, 1999, Respondent presented the two options to Petitioner. *Id.* at 170-171; Wilson Dep. Ex. 60. Petitioner chose to leave Respondent, accepting the second option of six months' severance, the company car, and relocation back to North Carolina. *Id.* at 170-173; Exs. 60, 61. The only reason Petitioner rejected the transfer back to North Carolina is because it was a demotion. *Id.* at 173. Shortly thereafter, Petitioner returned to her house in North Carolina. Although Petitioner performed no work for Respondent after January 8, 1999, Respondent continued to pay her through March 1999. *Id.* at 178-180.

When a dispute arose as to whether the separation package offered to Petitioner also contemplated Petitioner executing a release of claims (Petitioner said she should not have to sign a release, Respondent said she did), Respondent increased the monetary offer from six months to seven months pay (plus the car and relocation reimbursement) in exchange for a release. Petitioner accepted the increased offer. 1SR-Wilson Dep. Ex. 61.

Petitioner testified that she signed a release-of-claims document on March 18 or 19, 1999. 1SR-Wilson Dep. at 176-178; Ex. 61. On March 29, 1999, she then, through her attorney, revoked her acceptance. *Id.* at 178. By the time she had revoked her acceptance in late March 1999, Petitioner realized that returning to Respondent was not an option. *Id.* Having chosen to accept a severance package rather than remain with Respondent, and then revoking her acceptance, Petitioner rendered herself unemployed. 1SR-Hueneke Dep. at 106.

8. Respondent Replaces Grizzle And Petitioner

In April 1999, Respondent filled the position of regional vice president for the Southeast with Donald G. Johnston, a current employee of Respondent who relocated to Atlanta from the Pittsburgh area. R1-24 App. Johnston Aff. ¶ 3. As of October 9, 2000, Johnston was 53 years old.

Johnston did not try to fill the job of area manager until May 2000, and it was on September 25, 2000 that Kathy Taylor, an external hire with 20 years of experience in the staffing industry, filled the position. R1-24 App. Johnston Aff. ¶ 5. Taylor was 55 years old when Respondent hired her. *Id.* ¶ 6.

REASONS FOR NOT GRANTING THE WRIT

SUMMARY OF REASONS FOR NOT GRANTING THE WRIT

In her concurring opinion in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 154-155 (2000), Justice Ginsburg suggests that it may become incumbent upon the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond that which would be required to rebut evidence of non-discriminatory treatment by an employer. Petitioner's suggestion, however, that this case is an appropriate vehicle for such an undertaking is inapposite.

Petitioner offered no evidence to suggest that Respondent's legitimate non-discriminatory reasons for offering her the option of returning to North Carolina to be a district manager or accepting a severance package were pretextual. Moreover, Respondent replaced Petitioner in Atlanta with someone (Ms. Taylor) age 55, which, without more, precludes a prima facie case of age discrimination because Ms. Taylor is not significantly younger than Petitioner. *See, O'Connor v. Consol. Coin Caterers*, 517 U.S. 308, 313 (1996).

Respondent removed Petitioner from her position in Atlanta because of the way she treated her subordinates and the high turnover and numerous employee complaints that resulted from that treatment. That Respondent received continuous documented complaints about Petitioner's mistreatment of employees is undisputed. That most of those complaints came from employees who resigned, or threatened to resign, from Respondent's employ is undisputed. That many of the people who did resign were managers with considerable experience is undisputed.[8] That turnover in

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[8] D'Arezzo had been with Respondent for twelve years and Hass for eight years.

Petitioner's area was too high is undisputed. That Petitioner was replaced in Atlanta by someone 55 years old and with 20 years of experience is undisputed. That abusing employees and high turnover are legitimate, non-discriminatory reasons is undisputed. Petitioner offered no probative evidence to the contrary.

Petitioner's failure to meet the minimum requirement to survive judgment as a matter of law, i.e., offer evidence from which a rational factfinder could conclude that Respondent's reasons were pretextual, belies her suggestion that this case is an appropriate opportunity for the Court to define the circumstances in which plaintiffs would be required to submit evidence *beyond* this minimum threshold in order to survive a motion for judgment as a matter of law.

The District Court properly granted summary judgment. The Eleventh Circuit Court of Appeals properly affirmed that judgment, *per curiam*. Respondent respectfully requests that the Court deny this Petition for certiorari.

ARGUMENT

I. PETITIONER'S FAILURE TO OFFER EVIDENCE REBUTTING RESPONDENT'S LEGITIMATE, NON-DISCRIMINATORY REASONS MAKES THIS CASE AN INAPPROPRIATE VEHICLE TO DEFINE THE CIRCUMSTANCES IN WHICH PLAINTIFFS WILL BE REQUIRED TO SUBMIT EVIDENCE BEYOND THAT FROM WHICH A FACTFINDER COULD CONCLUDE THAT AN EMPLOYER'S PROFFERED REASONS ARE FALSE

In her concurring opinion in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 154-155 (2000), Justice Ginsburg suggested that "it may become incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be

required to submit evidence beyond" that which would be required to rebut evidence of non-discriminatory treatment by an employer in order to survive a motion for judgment as a matter of law. Petitioner's failure to offer evidence from which a rational factfinder could conclude that Respondent's reasons are pretextual, as the Court in *Reeves* held is necessary to survive judgment as a matter of law, belies Petitioner's suggestion that this case is appropriate for such an undertaking.

In *Reeves*, the Court held that an employment discrimination plaintiff *may* survive summary judgment as a matter of law by submitting two categories of evidence: first, evidence establishing a "prima facie case," as that term is used in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); and second, evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false. *Reeves*, 530 U.S. at 149. As shown below, Petitioner failed to submit evidence from which a rational factfinder could conclude that Respondent's proffered explanation for its actions – that Petitioner was abusive to employees and that the employee turnover in her area was unacceptably high – are pretextual. Moreover, Petitioner failed to adduce any evidence whatsoever to suggest that it was her age, and not her abusive and unprofessional management style, that motivated Respondent to offer her a demotion or a severance package. As a result, Petitioner failed to meet the minimum standards for surviving a motion for judgment as a matter of law. Certiorari in these circumstances is not warranted.

II. PETITIONER PROVIDED NO CREDIBLE EVIDENCE TO UNDERMINE THE TRUTHFULNESS OF RESPONDENT'S LEGITIMATE NON-DISCRIMINATORY REASONS IN LIGHT OF THE CONTINUED, DOCUMENTED COMPLAINTS ABOUT PETITIONER'S ABUSIVENESS AND THE RESULTING HIGH EMPLOYEE TURNOVER

There is no evidence that Respondent's legitimate non-discriminatory reasons for its actions are pretextual. Where an employer articulates legitimate non-discriminatory reasons, the burden returns to the plaintiff to adduce "significantly probative evidence" that the employer's articulated reasons for its decision are pretextual. *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991); *Carter v. City of Miami*, 870 F.2d 578, 584 (11th Cir. 1989). A plaintiff may not establish pretext merely by contesting the wisdom of the employer's decision, at least where the reason is one that might motivate a reasonable employer. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997). Neither does pretext exist where a plaintiff's only hope is that a jury will simply choose to disbelieve the decisionmaker. *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994).

Respondent has articulated legitimate non-discriminatory reasons for its decision to relieve Petitioner of her duties as Atlanta area manager: chronic employee relations problems as reflected by continuous, documented employee complaints, low morale, and resulting high turnover. 1SR-Krueger Dep. at 49, 50, 54, 55, 157, 177, 195-96, 211-213; 1SR-Hueneke Dep. at 76-78, 80. Petitioner failed to create a disputed issue of material fact as to pretext merely by denying the truth of the repeated complaints lodged against her over a three-year period. Petitioner also offered no comparative evidence, such as evidence showing that there were other, younger managers about whom so many complaints were received, but

who were treated more favorably than Petitioner. R3-37-13.

A. RESPONDENT RECEIVED CONTINUOUS, DOCUMENTED COMPLAINTS FROM EMPLOYEES, MANY OF WHOM RESIGNED, REGARDING PETITIONER'S UNPROFESSIONAL TREATMENT OF THEM AND THERE IS NO EVIDENCE TO SHOW THAT REASON IS A LIE

The evidence is uncontroverted that Respondent received many complaints regarding Petitioner's behavior toward her subordinates in Atlanta. *See, e.g.*, 1SR-Wilson Dep. Exs. 15, 17, 18, 19, 20, 22, 23, 24, and 25. Unable to deny that the complaints were made, Petitioner misstates the facts in the record and argues that Respondent somehow believed that all of the documented complaints about Petitioner were false.[9] Pet. at 2.

1. Respondent Believed That The Continuous Stream Of Employee Complaints Reflected A Serious Employee Relations Problem In The Atlanta Area

In arguing that Respondent disbelieved all of the employee complaints it received about Petitioner, Petitioner relied on the testimony of the former Regional Vice President, Grizzle, whom Respondent had fired for sexual harassment *thirteen months before* it decided that Petitioner could not continue as Atlanta area manager. Pet'r

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[9] Unless Respondent knew the complaints were false, whether or not the complaints were actually false is irrelevant. As long as Respondent honestly believed the complaints, they serve as a legitimate, nondiscriminatory reason for Respondent's decision. *Elrod v. Sears, Roebuck & Co.*, 929 F.2d 1466, 1470 (11th Cir. 1991).

Br. to the United States Ct. of Appeals for the Eleventh Circuit ("Pet'r 11th Cir. Br.") at 13-14. The long-fired Grizzle had no role in the decision to remove Petitioner as area manager, and therefore what Grizzle did or did not believe is immaterial. *Trotter v. Bd. of Trs. of the Univ. of Ala.*, 91 F.3d 1449, 1457 (11th Cir. 1996).

Equally important, there is no evidence that Krueger or Hueneke disbelieved the complaints of employee abuse. Krueger, who recommended an investigation, did not always accept what Grizzle told him. 1SR-Krueger Dep. at 157; R3-37-14. It is undisputed that the Executive Vice President in Milwaukee, Terry Hueneke (age 56), after receiving an oral report of the investigation, made the decision to offer Petitioner the option of returning to North Carolina as a district manager or accepting a severance package. There is not one iota of evidence in the record to suggest that Hueneke's decision was based on anything other than the serious, continuous, documented employee relations problems in Atlanta, as confirmed by the investigators, Ms. McLaughlin and Ms. Marcott.

Based on the continuous nature of the complaints over a three-year period, Respondent had to have known to an absolute certainty that it had a serious employee relations problem in Atlanta. Twelve complaints, some from experienced managers, accompanied by resignations, threatened resignations, and medical problems[10] are overwhelming proof of major employee dissatisfaction. The sheer number, similarity, and seriousness of the complaints would have caused any responsible employer to conclude that there were major problems in Atlanta.

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[10] Ms. D'Arezzo, the twelve-year veteran who Grizzle recommended to be area manager and who Grizzle later asked not to resign, said that the situation with Petitioner was causing her to become ill. 1SR-Wilson Dep. Ex. 20. Priestman was prescribed the anti-depressant, Paxil, because of her situation at work. 1SR-Priestman Dep. at 123, 149.

While Petitioner argues in her Petition that Priestman's testimony is "directly contrary to claims of 'employee abuse,'" just the opposite is true. Pet. at 16. Petitioner claims that Priestman's deposition testimony "confirmed" that Petitioner never "screamed or yelled," never had temper tantrums, and never threatened anyone. *Id.* at 5. To the contrary, Priestman confirmed that she was sometimes very afraid of Petitioner (1SR-Priestman Dep. at 31), her staff was "very afraid" of Petitioner (*Id.*), that Petitioner "managed by intimidation" (*Id.*), that Priestman's staff complained that Petitioner had yelled at them (1SR-Priestman Dep. at 85-86), that Priestman heard Petitioner yell at Budd which made Budd cry (1SR-Priestman Dep. at 87-88), and that the staff, including Priestman and Budd, feared for their lives. (*Id.* at 88). Budd's affidavit similarly states, "[Petitioner] was abusive towards me and other [Respondent] managers and employees in Atlanta on a regular basis" (R1-24-App. Budd Aff. ¶ 4), "I was and am afraid of [Petitioner]. To this date, I still have nightmares about her. She screamed at me and others, slammed doors, and hung up on people" (*Id.* at ¶ 12). Both Budd's affidavit and Priestman's deposition testimony support Respondent's position.

2. That Respondent Offered Petitioner The Opportunity To Return To North Carolina As A District Manager Does Not Contradict Respondent's Legitimate Non-Discriminatory Reason

Respondent's decision to offer Petitioner a district manager position in North Carolina does not contradict Respondent's legitimate non-discriminatory reason. Petitioner's assertion that the district manager position "required more employee contact and supervision then [sic] did Petitioner's position as Atlanta area manager" is misleading. As a district manager, Petitioner would not only have had responsibility for many fewer locations (and correspondingly fewer employees), she would also have

had less authority, and she herself would have been more closely supervised since the North Carolina office already had an area manager, Lynda Bowman, whereas Mr. Krueger had been trying to supervise Petitioner from Milwaukee, a situation that was satisfactory to no one. The demotion would not have given her more opportunity to abuse employees, it would have given her less because she would have had many fewer employees to abuse, less authority with which to be abusive, and a manager on hand to keep the abuse from happening at all.

Respondent's decision to offer Petitioner a position of less authority, under close supervision, and with fewer subordinate employees is entirely consistent with its belief that Petitioner had been the cause of chronic employee relations problems and high turnover in Atlanta. That Respondent chose to offer Petitioner a second chance, rather than to outright discharge her, is simply reflective of the fact that Respondent hoped Petitioner might change her behavior. It is hardly reflective of age discrimination.

3. Grizzle's "Be Aggressive" Memo to Petitioner In 1995 Is Not Evidence That Respondent's Reasons For Removing Her As Area Manager In 1999 Were Pretextual

Petitioner cites to a memo Grizzle sent to her dated September 15, 1995 telling her to be aggressive to suggest that Respondent's reason is pretextual. Pet. at 4. The most obvious flaw with any suggestion that this memo renders Respondent's reason pretextual is Petitioner's own testimony that Grizzle's memo did nothing to influence the manner in which Petitioner treated her subordinates. 1SR-Wilson Dep. at 151. According to her, Petitioner would have treated her subordinates the same even if Grizzle had not sent Petitioner the memo.

The second flaw with Petitioner's suggestion is that Grizzle sent her a later memorandum directing her to stop

"micromanaging" and telling her that unless she changed her methods "there is no recovery." 1SR-Wilson Dep. Ex. 21.

The third flaw is that the 1995 memo certainly did not instruct Petitioner to throw things, yell at people, threaten people, intimidate people, slam doors, or to engage in any of the behaviors that her subordinates complained of.

The final flaw is that whatever the departed Grizzle said in a single memo to Petitioner in 1995 has no bearing on what Mr. Hueneke in 1999 decided should be done in order to address the chronic problems in Atlanta that had gone on far too long.

4. There Was No Statistical Evidence In This Case

As the District Court properly found, the "statistical evidence" offered by Petitioner in this case is meaningless. R3-37-12, 13.

Courts generally exercise caution in relying on statistics in an age discrimination case. *Vaughan v. MetraHealth Cos.*, 145 F.3d 197, 203 (4th Cir. 1998). Statistics are generally of little, if any, probative value in an individual case. *Smith v. Horner*, 839 F.2d 1530, 1537 n.8 (11th Cir. 1988) (statistics alone cannot be used to establish a prima facie case of discrimination in an individual disparate treatment case).

Petitioner cannot escape the deficiencies of her alleged statistical evidence – no analytic foundation and no context. There is no evidence as to how the qualifications of the persons selected to be a regional vice president compare to those not selected; there is no evidence regarding who applied for the promotions; there is no expert testimony. Statistical evidence without this type of context is meaningless and alone is not evidence that an employer's proffered reasons are pretextual. *Lee v. GTE Fla., Inc.*, 226 F.3d 1249, 1255 n.2 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 1486 (2001).

B. THERE IS NO EVIDENCE THAT RESPONDENT'S OTHER REASON – HIGH EMPLOYEE TURNOVER – IS PRETEXTUAL

In addition to the chronic, documented complaints about Petitioner, Respondent was also concerned about the enormous employee turnover, including management turnover, in the Atlanta market. With just the resignations of Ms. Haas and Ms. D'Arezzo, both managers, the Company lost a total of twenty years of experience. Petitioner now claims that "there is no evidence that turnover rates were any higher" under Petitioner than at any other period. Pet. at 17. That argument provides no basis for which a rational factfinder could conclude that Respondent's concerns about turnover were pretextual.

First, Petitioner admits that she was "expressly instructed by her superiors to address the issue of chronic under-performance in the Atlanta area," including turnover. *Id.* at 3-4. Krueger predicted an annualized turnover rate of 94% (1SR-Wilson Dep. Ex. 50); Petitioner projected an annualized turnover rate of 66.7%.[11] *Id.* Even giving credence to Petitioner's assertion that these excessive levels of turnover were no higher than those achieved under any other area manager, Petitioner nonetheless clearly failed to live up to Respondent's express instructions to reduce the level of turnover. Krueger told Petitioner that he, Fromstein (the President of Respondent), and Hueneke (the Executive Vice President who made the decision to offer Petitioner the choice of returning to North Carolina or accepting a severance package) had higher expectations for the Atlanta market. 1SR-Wilson Dep. at 114-116. Petitioner's failure to achieve the results expected

[11] Even Grizzle, before his firing, thought turnover was "more excessive than what I thought should have been going on." 1SR-Grizzle Dep. at 145.

of her justified Respondent's actions. Age was never a factor.

Second, Petitioner knew herself that the turnover in her area was "too high." 1SR-Grizzle Dep. at 145. She knows of no area that had a higher employee turnover rate than hers did. 1SR-Wilson Dep. at 199. Moreover, Petitioner's own testimony is that Krueger blamed her for the high turnover rate. *Id.* at 129-130. While Petitioner may believe that blaming her for the high turnover is unfair, there is no dispute that Respondent did, in fact, believe that Petitioner was accountable for the high turnover, and it had a sound basis for that belief. Many of the resignation letters expressly state that the reason employees were leaving in droves was because of Petitioner. 1SR-Wilson Dep. Exs. 15, 17, 19, 20, 25.

Third, if low pay was the problem, as Petitioner suggests,[12] one might have expected Petitioner to have said something about low pay being a problem, or to have recommended a salary review, in the communications she exchanged with Krueger. Instead, in one memo, Petitioner blames the fact that everyone is quitting on an employee "conspiracy." 1SR-Wilson Dep. Ex. 27. Moreover, of the non-anonymous people who complained in writing about Petitioner – Pamela Barkley, Diana Haas, Else Henry, Vallerie Brown, Susan D'Arezzo, Mary Heeking, and Kathi Badal – all gave Petitioner, not low pay, as the reason they were resigning.[13]

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[12] "Personnel turnover has always been very high in Atlanta because Respondent under-compensated its employees. . . . " Pet. at 4.

[13] Perhaps Petitioner forgot about the resignations of Mses. Barkley, Haas, Henry, Brown, D'Arezzo, Heekin, and Badal when she claims on page 17 of her Petition that the exit interviews of departing Respondent employees indicated that none of them were leaving because of Petitioner's abuse. Pet. at 17. Perhaps Petitioner sees a meaningful distinction between an exit interview and letters from seven resigning employees saying the reason they are resigning is

(Continued on following page)

Petitioner's assertion that none of the sixteen employees who departed in 1998 indicated that they were leaving because of Petitioner's abuse (Pet. at 17) ignores four obvious points: (1) it ignores the written complaint letters expressly stating that the employees were resigning because of Petitioner; (2) it ignores the fact that four of the resigning employees in 1998 cited "job dissatisfaction" and three cited "stress" as the reason they were quitting; (3) it ignores the employees who in 1998 said they were considering quitting because of Petitioner or, in Harold Schwartz's case, decided not to work at Respondent at all because of Petitioner; and (4) it ignores the obvious fact that, as pointed out by one of the letter-writers, when people "do leave they don't tell the real reason in the exit interview because they are usually with her [Petitioner]." 1SR-Wilson Dep. Ex. 24.

Petitioner can argue that the unusually high turnover was not her fault. Respondent obviously, and for good reason, concluded otherwise. Petitioner has no evidence to show that Respondent did not honestly believe that she was the primary cause of the high turnover and no evidence to suggest that that was not Respondent's reason for wanting her out of the Atlanta market.

III. PETITIONER PROVIDED NOT ONE SHRED OF EVIDENCE TO INDICATE THAT HER AGE HAD ANYTHING TO DO WITH RESPONDENT'S ACTIONS

As the Court reminds us in *Reeves*, "[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff

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because of Petitioner. Or perhaps she is relying on a distinction between 1998 on the one hand and 1995, 1996, and 1997 on the other hand. Regardless, there exists overwhelming record evidence that Petitioner was the primary cause of Atlanta's unusually high turnover.

was a victim of intentional discrimination." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000).

In *Reeves*, the record is replete with indications that the employer's actions were motivated by the employee's age. The employee was told "he was so old he must have come over on the Mayflower" and that he "was too damn old to do his job." *Id.* at 151. Moreover, the employee adduced evidence that he was treated differently from younger employees despite the fact that they had nearly identical rates of productivity. *Id.* at 151-152.

Petitioner, on the other hand, provided no evidence to indicate that her age, and not the chronic, documented reports of abusive behavior and resulting employee turnover, had anything to do with Respondent's actions. Terry Hueneke, the Executive Vice President who made the decision to offer Petitioner the option of returning to North Carolina or accepting a severance package, was 56 years old. Petitioner's replacement, Kathy Taylor, was 55 years old. Grizzle's replacement, Donald G. Johnston, was 53 years old. Kathy Bowman, the area manager who would have supervised Petitioner in North Carolina had she accepted the position offered by Respondent, was 61 years old.

The answer to the ultimate question in this case is that Petitioner was a victim of her own abusive and unprofessional management style and her unwillingness to modify that style and stem the unacceptably high level of employee desertion it caused. Age was not a factor.

CONCLUSION

Respondent offered two legitimate, non-discriminatory reasons for its actions. Petitioner failed to provide evidence from which a rational factfinder could conclude that either of these reasons was pretextual. As a result, the District Court's granted summary judgment and the Eleventh Circuit Court of Appeals affirmed *per curiam*.

Petitioner's failure to adduce even the minimum evidence required to survive a motion for judgment as a matter of law makes this case inappropriate for certiorari.

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